Supreme Court, U.S.
FILED
OCT 4 2000
CLERK

(5)

No. 00-289

In the Supreme Court of the United States

J.T. YARNELL, in his official capacity as Chief Engineer of the Missouri Department of Transportation, ET AL.,
Petitioners,

v.

MICHAEL CUFFLEY and the KNIGHTS OF THE KU KLUX KLAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

RICH TIEMEYER
Chief Counsel
PAULA LAMBRECHT
Senior Administrative Counsel
Missouri Highways & Transportation Commission
221 Bolivar Street, Suite 400
Jefferson City, MO 65102
(573) 526-4096

CHARLES A. ROTHFELD
Counsel of Record
SHARON SWINGLE
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

6pp

PETITIONERS' REPLY BRIEF

The Klan's brief in opposition does not take issue with *any* of the submissions in the petition for certiorari. The Klan thus does not deny that the Eighth Circuit's state-action analysis both conflicts with this Court's holdings and contributes to a pervasive confusion in the courts of appeals. The Klan attempts neither to defend the court of appeals' misreading of Title VI nor to deny that the decision below creates intolerable uncertainty regarding federal funding decisions governed by that statute. And the Klan does not suggest that the Eighth Circuit's analysis can be reconciled with the State's interest in determining the content of its own speech.

Instead, the Klan hinges its opposition to certiorari entirely on the proposition that the court of appeals found the State's asserted reasons for denying the Klan's participation in the Adopt-A-Highway program to be "pretextual." The Klan thus maintains that "Missouri asserts the right to exclude an applicant on the basis of its beliefs" (Br. in Opp. 1); that "[t]he Court below rejected Missouri's reliance on the purported nondiscrimination reasons as pretextual" (*id.* at 3); and that this "ruling is wholly independent of the constitutional issues raised by Missouri's petition." *Id.* at 4. The Klan's argument, however, rests on a plain misreading of the court of appeals' holding.

1. In fact, as we explain in the petition (at 11-12), the court of appeals expressly premised its decision on the conclusion that Missouri's stated reasons for denying the Klan's application were unconstitutional — that is, on the holding that there was no "convincing and constitutional reason for the denial." Pet. App. 8a. Declaring that the absence of such a "convincing and constitutional reason" led it to believe "that the State denied the Klan's application based on the Klan's beliefs and advocacy" (*ibid.*), the court proceeded to "discuss the State's [asserted] reasons" for denying the application. *Id.* at 9a. In doing so, the court explicitly considered and rejected

the State's argument that Klan involvement in the Adopt-A-Highway program would constitute state action, "conclud[ing] that this reason for refusing participation * * * constitutes an unconstitutional condition on the Klan's participation." *Id.* at 12a. Similarly, the court discussed at length the submission by both Missouri and the United States that Klan participation would violate Title VI, ultimately holding that "the United States interprets the 'program' at issue too narrowly" (*id.* at 14a) and that "[s]o long as the State does not deny anyone an opportunity to adopt a highway on an improper basis, the State does not violate Title VI." *Id.* at 15a.[1] These conclusions unambiguously disposed of the constitutional issues in the case.

To be sure, having analyzed and resolved the State's arguments on the merits, the court of appeals went on to opine that "[n]ot only do the State's discrimination-related reasons not make sense, but there also is evidence that * * * these * * * reasons are entirely pretextual." Pet. App. 15a. But this brief assertion — appearing in one paragraph appended to the tail-end of the court's lengthy explanation of its legal analysis and conclusions — plainly was intended to support, and not to substitute for, the court's statement of its holding on the merits. Fairly read, there can be no doubt that the court's resolution of the state-action and Title VI issues was meant to be a conclusive disposition of these points, and that this holding will be regarded as binding by future panels of the court of appeals, by other state and local governments in the Eighth Circuit, and

---

[1] In contrast, the court disposed of a *different* rationale offered by the State for denial of the Klan's application — that the Klan has a history of criminal violence — on the *sole* ground that "[a]ll of the evidence * * * supports the Klan's contention that this reason is pretextual." Pet. App. 12a. The court did not offer any discussion of the merits of that justification. This contrast in treatment between the criminal violence rationale on the one hand, and the state-action and Title VI rationales on the other, confirms that the court's holding on the state-action and Title VI issues turned on its analysis of the merits.

by the United States in its administration of Title VI.[2] Indeed, given the court's express statement that its finding of improper motive was premised on the absence of "a convincing and constitutional reason for the denial" (Pet. App. 8a), the Klan necessarily is wrong in asserting that the court's views on pretext were "wholly independent" of its constitutional discussion. Br. in Opp. 4.[3]

2. In addition, so far as the issues presented in the petition are concerned, the Klan's discussion of pretext is simply a red herring. Certainly, in most instances the First Amendment obligates States to disregard the ideology of entities that apply to participate in state programs. In circumstances like the ones here, however, the dictates of the state-action doctrine and the

---

[2] Thus the *amicus* brief filed in support of the petition by the District of Columbia and 28 States, including four States in the Eighth Circuit.

[3] It might be added parenthetically that the evidence supporting the court's musings on pretext is open to question. Declaring it "common knowledge" that certain highway adopters, such as the Knights of Columbus, have discriminatory membership policies, the court found it suspicious that only the Klan's application was rejected. Pet. App. 16a. But the Klan is the only adopter whose entire reason for being is discrimination against racial minorities; it is not surprising that its application came to the attention of state officials, while those of other organizations that might have been challenged did not. That background hardly shows that the State's asserted reasons for denying the application were pretextual. The court also pointed to testimony by a state official to the effect than an applicant's "beliefs" could be taken into account in singling out the applicant for special scrutiny (*id.* at 7a), but the court ultimately chose not to rest its decision on that evidence because "a justification for further review of an application does not necessarily equate with justification for denial of an application." *Id.* at 8a. In any event, the relevant point for present purposes is that, notwithstanding the court of appeals' mention of pretext, the court's conclusions regarding the legal issues in the case plainly constituted its holding.

provisions of Title VI *required* Missouri to take account of the Klan's policy of racial discrimination by excluding the Klan from the Adopt-A-Highway program.[4] By the same token, the State was under no obligation to maintain an air of ideological neutrality in administering the portions of the program that involved the State's *own* speech; the State has every right to condemn (and, conversely, to withhold praise in the form of highway signs from) groups that seek to foment racial hatred. Although we made these points in the petition (at 11-12 & 24-26), the Klan offers no response.

The Klan also does not deny the importance of obtaining immediate resolution of the issues presented here. As the *amicus* brief submitted by 28 States and the District of Columbia in support of the petition correctly notes, immediate review is essential because "[p]rotracted litigation on a matter of such obvious sensitivity carries with it the danger of unnecessary societal dissension and loss of public confidence in our institutions of government" (Br. 2) — a danger that is compounded by the prospect of States "being forced to validate the Klan through the erection of highway signs announcing its presence as a partner of government." *Id.* at 3. In addition, as we also noted in the petition (at 23), the decision below threatens federal funding decisions, requires States in and outside of the Eighth Circuit to choose between legal liability and the loss of federal highway funds, and may disrupt Adopt-A-Highway programs across the Nation. Again, the Klan makes no response to these points. Because the court of appeals' holding plainly resolved the constitutional issues put before it, because those issues are recurring ones of great practical importance, and because the Klan has not offered any

---

[4] For this reason, the Klan cannot be correct in asserting that the court of appeals' statement about pretext is unrelated to its legal analysis; given the nature of the State's asserted bases for denying the Klan's application, the court *could not make a finding of pretext* without first finding that those bases were legally insupportable.

substantial reason for the Court to deny the petition, review of the questions presented here is appropriate.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RICH TIEMEYER
Chief Counsel
PAULA LAMBRECHT
Senior Administrative Counsel
Missouri Highways &
Transportation Commission
221 Bolivar Street, Suite 400
Jefferson City, MO 65102
(573) 526-4096

CHARLES A. ROTHFELD
Counsel of Record
SHARON SWINGLE
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

OCTOBER 2000